

NO. 45237-5-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

TERRY LEE SIMMONS,

Appellant.

BRIEF OF APPELLANT

**John A. Hays, No. 16654
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ASSIGNMENT OF ERROR

Assignment of Error

The trial court exceeded its authority when it imposed restitution for charges dismissed pursuant to a plea bargain when the defendant did not agree to pay restitution on those offenses.

Issues Pertaining to Assignment of Error

Does a trial court exceed its authority if it imposes restitution for charges dismissed pursuant to a plea bargain when the defendant did not agree to pay restitution on those dismissed offenses?

STATEMENT OF THE CASE

By information filed October 29, 2012, the Lewis County Prosecutor charged Defendant Terry Lynn Simmons with six counts of animal cruelty in the first degree and two counts of animal cruelty in the second degree. CP 1-6. Each count involved a separate animal. *Id.* The state later filed an amended information dropping all but the last two counts to which the defendant pled guilty. CP 19-20, 21-24. The plea bargain did not require that the defendant pay restitution for the state's expenses in taking care of any but the two animals which were the subject of the two counts to which he pled guilty. *Id.*

Following sentencing, the court set a restitution hearing at which the state requested payment for the care of all of the animals in both the two counts on which the defendant pled as well as the counts that were dismissed. RP 17-23. The defense responded by arguing that the court did not have authority to impose restitution on the dismissed counts because the defendant did not agree to pay that restitution as part of the plea bargain. *Id.* However, while the parties disputed whether or not the defendant should be held liable for restitution on the dismissed counts, they did not dispute the amount of restitution relating to the two counts to which the defendant pled guilty. RP 2-4, 17-28. That amount was \$3,211.18. RP 18; Ex. 1-6.

Ultimately the trial court followed the state's request and imposed

restitution for all of the animals involved. CP 32-33. That amount was \$20,589.42. CP 32-33. The court stated as follows on this issue:

These individuals, I don't know them, I don't know what happened here, they caused the damage. Somebody is paying for it, and it won't be the people that take these damaged animals in. And I get there from saying, look, this may be ambiguous, but there is little question in my mind that what was meant was restitution for all of them, and I just can't get by that. And also the overlay of reading restitution statutes liberally in favor of the victims – that's an unfortunate term here – is what I'm supposed to do, and that's what I'm going to do.

RP 28-29.

The defendant filed timely notice of appeal from the order of restitution. CP 34.

ARGUMENT

UNDER RCW 9.94A.753 THE TRIAL COURT EXCEEDED ITS AUTHORITY WHEN IT IMPOSED RESTITUTION FOR CHARGES DISMISSED PURSUANT TO A PLEA BARGAIN BECAUSE THE DEFENDANT DID NOT STIPULATE TO PAY RESTITUTION ON THOSE OFFENSES

Under the Washington Constitution courts do not have the inherent power to impose restitution in criminal cases. *State v. Tracy*, 73 Wn.App. 386, 869 P.2d 425 (1994). Rather, a court's authority to impose restitution is derived solely from statute. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). In Washington the legislature has granted court this authority under RCW 9.94A.753, which allows a court to impose restitution "whenever the offender is convicted of an offense which results in . . . damage to or loss of property." RCW 9.94A.753(5). In addition, the imposition of restitution "is allowed only for losses that are 'causally connected' to the crimes charged." *State v. Tobin*, 161 Wn.2d at 524. The phrase "causally connected" creates a "but for" standard requiring only that the state prove that "but for" the defendant's criminal acts, the damages would not have occurred. *State v. Tobin*, 161 Wn.2d at 524, 527; *State v. Landrum*, 66 Wn.App. 791, 799, 832 P.2d 1359 (1992) (interpreting a similar restitution statute).

A trial court's decision to impose restitution is reviewed under an abuse of discretion standard. *State v. Tobin*, 161 Wn.2d at 523. A court abuses its discretion when the restitution decision is manifestly unreasonable

or exercised on untenable grounds or for untenable reasons. *State v. Enstone*, 137 Wn.2d 675, 974 P.2d 828 (1999). Application of an incorrect legal analysis or other error of law may constitute abuse of discretion. *State v. Tobin*, 161 Wn.2d at 523.

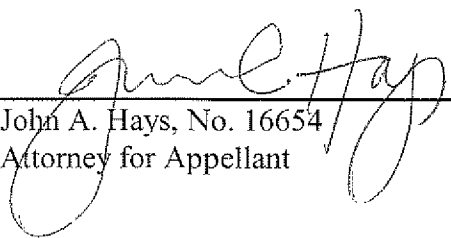
In the case at bar the agreed amount of restitution associated with the two offenses to which the defendant pled guilty was \$3,211.18. Under RCW 9.94A.753(5) this was the only amount the court had authority to impose because it was the only amount associated with the “offenses” for which the defendant was “convicted.” As a result, the trial court exceeded its authority when it imposed restitution on the dismissed counts.

CONCLUSION

The trial court exceeded its authority when it imposed restitution on dismissed offenses. As a result, this court should vacate the order of restitution and remand with instructions to reset the amount of restitution to \$3,211.18.

DATED this 2nd day of December, 2013.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

RCW 9.94A.753

(1) When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days except as provided in subsection (7) of this section. The court may continue the hearing beyond the one hundred eighty days for good cause. The court shall then set a minimum monthly payment that the offender is required to make towards the restitution that is ordered. The court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.

(2) During the period of supervision, the community corrections officer may examine the offender to determine if there has been a change in circumstances that warrants an amendment of the monthly payment schedule. The community corrections officer may recommend a change to the schedule of payment and shall inform the court of the recommended change and the reasons for the change. The sentencing court may then reset the monthly minimum payments based on the report from the community corrections officer of the change in circumstances.

(3) Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

(4) For the purposes of this section, for an offense committed prior to July 1, 2000, the offender shall remain under the court's jurisdiction for a term of ten years following the offender's release from total confinement or ten years subsequent to the entry of the judgment and sentence, whichever period ends later. Prior to the expiration of the initial ten-year period, the superior court may extend jurisdiction under the criminal judgment an additional ten years for payment of restitution. For an offense committed on or after July 1, 2000, the offender shall remain under the court's jurisdiction

until the obligation is completely satisfied, regardless of the statutory maximum for the crime. The portion of the sentence concerning restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime. The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount. The offender's compliance with the restitution shall be supervised by the department only during any period which the department is authorized to supervise the offender in the community under RCW 9.94A.728, 9.94A.501, or in which the offender is in confinement in a state correctional institution or a correctional facility pursuant to a transfer agreement with the department, and the department shall supervise the offender's compliance during any such period. The department is responsible for supervision of the offender only during confinement and authorized supervision and not during any subsequent period in which the offender remains under the court's jurisdiction. The county clerk is authorized to collect unpaid restitution at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations.

(5) Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property or as provided in subsection (6) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

(6) Restitution for the crime of rape of a child in the first, second, or third degree, in which the victim becomes pregnant, shall include: (a) All of the victim's medical expenses that are associated with the rape and resulting pregnancy; and (b) child support for any child born as a result of the rape if child support is ordered pursuant to a civil superior court or administrative order for support for that child. The clerk must forward any restitution payments made on behalf of the victim's child to the Washington state child support registry under chapter 26.23 RCW. Identifying information about the victim and child shall not be included in the order. The offender shall receive a credit against any obligation owing under the administrative or superior

court order for support of the victim's child. For the purposes of this subsection, the offender shall remain under the court's jurisdiction until the offender has satisfied support obligations under the superior court or administrative order for the period provided in RCW 4.16.020 or a maximum term of twenty-five years following the offender's release from total confinement or twenty-five years subsequent to the entry of the judgment and sentence, whichever period is longer. The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount. The department shall supervise the offender's compliance with the restitution ordered under this subsection.

(7) Regardless of the provisions of subsections (1) through (6) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. If the court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the court within one year of entry of the judgment and sentence for entry of a restitution order. Upon receipt of a petition from the department of labor and industries, the court shall hold a restitution hearing and shall enter a restitution order.

(8) In addition to any sentence that may be imposed, an offender who has been found guilty of an offense involving fraud or other deceptive practice or an organization which has been found guilty of any such offense may be ordered by the sentencing court to give notice of the conviction to the class of persons or to the sector of the public affected by the conviction or financially interested in the subject matter of the offense by mail, by advertising in designated areas or through designated media, or by other appropriate means.

(9) This section does not limit civil remedies or defenses available to the victim, survivors of the victim, or offender including support enforcement remedies for support ordered under subsection (6) of this section for a child born as a result of a rape of a child victim. The court shall identify in the judgment and sentence the victim or victims entitled to restitution and what amount is due each victim. The state or victim may enforce the court-ordered restitution in the same manner as a judgment in a civil action. Restitution collected through civil enforcement must be paid through the registry of the court and must be distributed proportionately according to each victim's loss when there is more than one victim.

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STATE OF WASHINGTON,
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NO. 45237-5-II

vs.

**AFFIRMATION OF
OF SERVICE**

TERRY LYNN SIMMONS,
Appellant.

Donna Baker states the following under penalty of perjury under the laws of Washington State. On December 2, 2013, I personally e-filed and/or placed in the United States Mail the following documents with postage paid to the indicated parties:

1. Brief of Appellant
2. Affirmation of Service

Terry Lynn Simmons
890 State Route 7
Morton, WA. 98356

Jonathan Meyer
Law & Justice Center
2nd Floor
345 West Main Street
Chehalis, WA. 98532

Dated this 2nd day of December 2013, at Longview, Washington.



Donna Baker
Legal Assistant

HAYS LAW OFFICE

December 02, 2013 - 10:11 AM

Transmittal Letter

Document Uploaded: 452375-Appellant's Brief~2.pdf

Case Name: State vs. Terry Lee Simmons

Court of Appeals Case Number: 45237-5

Is this a Personal Restraint Petition? Yes ☐ No ☒

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

☒ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): ____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: ____

Comments:

No Comments were entered.

Sender Name: Cathy E Russell - Email: **jahayslaw@comcast.net**

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